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Supreme Court, U.S.
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No. 08-268

IN THE

Supreme Court of the United States

BURL CAIN, Warden, Louisiana State Penitentiary,

Petitioner,

v.

SALVADOR PEREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JOHN R. DANOS
ARNOLD & PORTER LLP
777 S. Figueroa St., 44th Fl.
Los Angeles, CA 90017
(213) 243-4000

G. BENJAMIN COHEN
Counsel of Record
636 Baronne St.
New Orleans, LA 70113
(504) 529-5955

Counsel for Respondent

218487

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether respondent's claim that no rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could conclude beyond a reasonable doubt that respondent failed to prove by a preponderance of the evidence that he was insane at the time of the offense is cognizable on a federal *habeas corpus* petition?

2. If respondent's sufficiency of the evidence claim is cognizable, did the Fifth Circuit Court of Appeals apply the appropriate standard of review?

3. Did the Fifth Circuit Court of Appeals correctly apply the standard of review to the facts of the case with respect to respondent's sufficiency of the evidence claim?

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INTRODUCTION

Petitioner (the "State") asks this Court to review three issues with respect to the Fifth Circuit Court of Appeals' ("Fifth Circuit") opinion affirming the portion of the United States District Court for the Eastern District of Louisiana's ("District Court") judgment that granted respondent Salvador Perez's ("Perez") *habeas corpus* petition with respect to Perez's sufficiency of the evidence claim. First, the State argues that Perez's sufficiency of the evidence claim was not cognizable in a *habeas corpus* proceeding despite that fact that the State never made such an argument to the Fifth Circuit or District Court and, instead, set forth for the Fifth Circuit the appropriate standard by which it should review Perez's sufficiency of the evidence claim. Second, the State argues that if this claim were cognizable in a *habeas corpus* proceeding, then the Fifth Circuit applied the wrong standard of review to the claim. The State makes this argument despite the fact that the Fifth Circuit applied the very standard the State argued it must apply, which is the legally appropriate standard. Finally, the State takes issue with how the Fifth Circuit applied its standard of review to the particular facts of the case. Not only is this third issue not the type typically reviewed on certiorari, but the State's contention is meritless. Viewing the evidence in the light most favorable to the State, there was only one conclusion a rational trier of fact could reach: Perez proved his insanity defense by a preponderance of the evidence.

STATEMENT OF THE CASE

I. The Events Surrounding the Shooting

The events leading to the tragic shooting of Officer Chris McCormick on the night of July 17, 1996 started weeks before that date. Perez lived on a small farm in Seguin, Texas with his wife and five children. He had a first grade education, is illiterate, and is significantly below the normal range in intelligence. He does not speak English, just Spanish. Until a few weeks before the incident at issue, Perez was a family man who led a normal life in rural Texas.

But in early July 1996, Perez began acting strangely. He believed people were watching him. He kept looking out the window toward his neighbor's house and was preoccupied when the phone rang. He talked in whispers "afraid somebody was going to hear him." He acted vigilant and afraid somebody was around or might be listening, even when he and his wife were alone in the car. He was afraid of leaving the house at night. His behavior was quieter, he did not sleep much, and he "grew more suspicious." Although he was unaware of this at the time, Perez, like his father, had developed a severe mental illness during his middle-aged years.

On the morning of July 15, 1996, Perez told his wife, Rosa, that he was going to go feed their cows. Perez took his twelve-year-old son and started to drive around, taking back roads different from his usual route to lose the people he believed were following him. Perez believed pursuers had selected a place where they were going to shoot him. After they fed the cows, Perez and

his son stopped by Rosa's mother's home and telephoned Rosa. Perez told Rosa their neighbors were following him and trying to kill him. When Rosa did not hear further from her husband that day, she telephoned the local police and asked for help in finding him. She said she did not know Perez's whereabouts and that he was hiding out.

Despite no evidence of actual pursuers, Perez fled his home, taking his 12-year-old son along. They headed for Florida, where Perez and his family had previously lived. Again, instead of using a highway, Perez initially took back roads to try to lose his imagined pursuers. But Perez believed they kept reappearing. When Perez and his son stopped at a gas station, Salvador Jr. went into the store to buy some food but before he was able to pay, Perez honked the horn because he was "scared and wanted to leave as soon as possible." Perez became nervous when the store door closed behind his son - he assumed the storeowners were locking up and were going to kill his son.

Salvador Jr. could tell that his father was afraid. When Perez was driving, his hands were shaking. Perez pressed buttons on the roof of the van, which he told Salvador Jr. would throw off his persecutors. Perez constantly tried to lose cars on the highway. He was convinced that people along the way were giving signals to others to indicate he had passed. But Perez's son never saw anyone following them. Although Perez had cash to pay for a motel (over $500),[1] they slept in the

[1] Perez's family was financially stable. Among other things, the family had been rear-ended by a truck, resulting in serious injuries for which the family received a settlement.

van after they left Seguin. They did not stop for food or drinks, and ate only watermelon during the two-day trip to New Orleans. Perez kept the air conditioning off, fearing it would cause the van to break down, and kept the windows rolled up as a defense against the imagined pursuers. The heat made Perez and his son extremely thirsty. After reaching New Orleans, Perez parked the van near the fairgrounds.

On the morning of July 17, 1996, Perez and Salvador, Jr. were confronted by fairgrounds security guard Byron Polite. Perez acted extremely protective of Salvador Jr. He showed Polite a gun but did not point it at him. Perez told Polite to leave them alone and, according to Polite, exclaimed: "You're not going to take my kid."[2] Perez acted as though he thought Polite would try to kidnap his son. That conduct was consistent with his delusional belief that pursuers were out to get him and his son. Polite left and called the police.

After this encounter, because Perez believed his "pursuers" knew the van he and his son were in, he told his son to wait while he looked for another vehicle. While Salvador, Jr. was waiting, guards picked him up and took him to their office. New Orleans Police Officer Taylor arrived at the office at approximately 6:00 p.m. on July 17, 1996, was told of the incident with security guard Polite, and learned that the boy had been separated from his father. Officer Taylor contacted the sheriff's

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[2] The precise words Perez used are not known — Officer Polite testified he understood that Perez just wanted to be left alone. It is uncontroverted that Perez speaks very little, if any, English.

office in Guadalupe County, Texas (where Seguin is located) and spoke with the sheriff who had spoken earlier with Rosa Perez. Officer Taylor also spoke with Salvador Jr., who said his father believed he was being followed by gangs from Texas. The boy also told Officer Taylor that the officer could call Mrs. Perez because she knew that Perez had exhibited "this kind of behavior" previously. Officer Taylor impounded Perez's van. Narcotics dogs later searched the van and found no drugs. Salvador Jr. telephoned his mother, who came to New Orleans the next day. It was then that he learned his father had been arrested for shooting a police officer.

The evening of July 17, 1996, Perez had returned to the van and found his son missing. Perez's worst fears had come true – in his mind, his son had been taken by his imagined pursuers. This "realization" catapulted Perez into a state of utter fright and panic that significantly exacerbated his delusional state. Rather than taking rational action, Perez barricaded himself in a room underneath a nearby house on Leda Street to hide from his "pursuers," whom he believed had located his van and kidnapped his son.

When Debbie Mastio arrived at her Leda Street home around 10:30 p.m., she discovered that no water came out of her hot water faucet. Shortly thereafter, an acquaintance, Dr. Elliot Black, arrived. Mastio told Black that she wanted to check the water heater. Black loaned her a flashlight because the stairs leading to the water heater room were very dark. Slowly, Mastio proceeded partially down the cement stairs and leaned over the staircase – that was the only way the water heater could be seen from the stairs – and shone the flashlight toward

the water heater room, where she saw a man holding a shiny cylindrical object. When the man pointed the object in Mastio's direction and said "hey," Mastio ran back upstairs.

Black then cautiously started down the stairs with the flashlight. Like Mastio, he leaned over the stairs, shining the flashlight toward the water heater. Black saw a man with a gun and ran back into the kitchen. Mastio called 911 and reported a prowler. The police did not respond for over 20 minutes – sufficient time for a rational man to flee after realizing he had been sighted. But Perez did not flee. At approximately 11:30 p.m., Officers Artie Jackson and Chris McCormick arrived without sirens, flashing lights or any other announcement of a police presence. Their flashlights were off; it was dark. After discussing the situation with Mastio and Black and Black informing the officers that Perez "looks to be crazy," Officer McCormick proceeded very quickly down the stairs as the others watched. Officer McCormick's descent, in complete darkness, was far more aggressive than Mastio's or Black's. Perez, in an acute state of fear, believed his pursuers had found him.

As McCormick reached the bottom stair, witnesses heard a single "pop." From the shed, given the darkness, Perez could not have seen that it was a police officer descending the stairs. Officer Jackson saw McCormick grab his chest and fall backwards, and called for back-up officers, who arrived within minutes. Officer McCormick was rushed to the hospital where he died of a single gunshot wound to his chest. The absence of powder markings on his body indicated that the shot was fired from some distance.

Officer Andrew Washington arrived and took statements from Mastio and Black, but did not find Perez there. The area was blocked off and methodically searched by canine units until Perez was found under the house next door. In English, Officer Chamblis repeatedly ordered Perez to come out, but Perez stayed put, without firing any shots, until a police dog attacked him. Perez fired two shots at the dog. Officer Chamblis then fired at Perez, striking him in his flank and cheek. The officer who retrieved Perez described him as "extremely limp." Mastio identified Perez as the man she saw in her water heater room. Perez was taken to the hospital, where he was conscious and tested negative for alcohol and controlled substances.[3]

II. The Trial

On September 24, 1996, Robert Jenkins was assigned as lead trial counsel for Perez. He requested a lunacy commission to determine whether Perez was competent to stand trial. A lunacy hearing was held on October 8, 1996, during which Drs. DeLand and Salcedo questioned Perez and asked for additional time to evaluate his medical records. On December 4, 1996, the court appointed a sanity commission comprised of Drs. Ritter and Salcedo. The court initially found that Perez was able to stand trial.

On April 11, 1997, counsel for Perez again requested a sanity commission, and the court appointed

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[3] Hospital records noted he was "alert times three." As Dr. Carrington testified at trial, that only means that Perez was not unconscious at the time. It does not mean that he knew right from wrong or was sane at the time he shot Officer McCormick.

Drs. Urrutia and Gutnisky. At the April 17, 1997 sanity hearing, the court reserved ruling until Perez could be examined by the Parish prison doctor. On May 22, 1997, the court heard Dr. Kronberger's testimony concerning Perez's mental state. Another lunacy hearing took place on May 27, 1997. The court found Perez incompetent to stand trial. On August 9, 1997, Perez was transferred to Feliciana Forensic Facility. There, he was placed on the anti-psychotic medication, Haldol. Perez's mental health gradually improved as his dosage increased. On December 16, 1997, he was remanded to Orleans Parish Prison for trial.

During Perez's opening statement, the defense stipulated that Perez fired the shot that killed Officer McCormick. Rather than address the lone remaining issue, Perez's insanity defense, the State's case in chief focused on improperly reiterating the stipulated fact that Perez shot Officer McCormick by parading out a host of unnecessary police witnesses (ten in all) as a constant reminder to the jury that Perez had killed a police officer.[4] The defense, on the other hand, offered the uncontroverted testimony of seven mental health experts, who testified as follows:

Dr. Kenneth Ritter, who had been appointed by the Court to determine Perez's competency to stand trial, concluded that Perez was legally insane at the time of the offense and suffered from chronic paranoid

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[4] Remarkably, the defense did not object to the parade of unnecessary police witnesses. The defense did, however, object to the numerous uniformed police officers present in the audience, which was overruled.

schizophrenia, which involved delusions that people were out to kill him. Dr. Ritter testified that Perez became competent to proceed to trial only after receiving the anti-psychotic medication, Haldol.

Dr. Salcedo, who also had been appointed by the Court to determine Perez's competency to stand trial, testified that at the time of the offense, Perez was suffering from atypical psychosis – a delusional disorder that prevented his knowing right from wrong. Dr. Salcedo considered whether Perez might be malingering (*i.e.*, faking his illness), but ruled out that possibility. Dr. Salcedo agreed that Perez only became competent to stand trial after treatment with Haldol.

Dr. Pena, who had been asked by the experts appointed by the Court to assist in determining competency, concluded that, at the time of the offense, Perez was suffering from a severe psychotic mental disturbance and was not able to distinguish right from wrong.

Dr. Urrutia, also a court-appointed expert with respect to determining competency, testified Perez had a persecutory type delusional disorder with paranoid and psychotic features rendering him legally insane at the time of the offense. Dr. Urrutia testified that the disorder made Perez think somebody was trying to hurt him, and that such disorders can make people violent since they believe "it's a matter of either they kill me or I kill them."

Dr. Carrington, an employee of Feliciana Forensic Facility, examined Perez every week for the first two

months of his hospitalization at the facility. Dr. Carrington focused on whether Perez was malingering, one of his areas of expertise. Dr. Carrington concluded that Perez was not malingering, but suffered from psychotic symptoms, which continued until Haldol took gradual effect at increased dosages. Perez's response to medicine supported Dr. Carrington's determination that he was not malingering.

Dr. Deland, another court-appointed expert that evaluated competency, initially believed that Perez might be malingering. However, after three examinations, she concluded that Perez had "paranoid delusions that he was being persecuted, followed, threatened," "was fearful for his life because of those delusions and those beliefs," and that he did not know right from wrong when he shot Officer McCormick.

Dr. Kronberger, a psychologist, examined Perez six times for a total of fourteen hours over a two-month period of time. He testified that Perez had a delusional disorder of a persecutory type, and that Perez was in an acute psychotic state at the time of the incident and did not know right from wrong when he shot Officer McCormick.

All seven experts testified that they specifically looked for signs of malingering, but concluded that Perez was not malingering or faking his illness. Their opinions were corroborated by Perez's family. Mrs. Perez testified about Perez's strange behavior during the weeks before he left Texas. Salvador Jr. testified about the bizarre odyssey between Seguin, Texas, and New Orleans, as well as his father's strange behavior in the

previous weeks. **No rebuttal evidence was offered by the State. The State did not call a single expert or witness to testify on the issue of Perez's state of mind at the time of the offense.** Nonetheless, the jury found Perez guilty of first degree murder with the specific intent to kill a police officer.

III. Perez's *Habeas Corpus* Petition

After Perez exhausted all state court remedies, he filed his petition for a writ of *habeas corpus* with the District Court on July 6, 2004. On January 8, 2008, the District Court granted the petition on three separate grounds: (1) the state court had unreasonably applied federal law concerning the sufficiency of the evidence; (2) the State had improperly withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and (3) Perez's trial counsel rendered ineffective assistance by failing to object to emotionally-charged, highly prejudicial evidence. The State appealed, and on May 29, 2008, the Fifth Circuit affirmed the District Court's Judgment.[5]

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[5] The Fifth Circuit did not address the second or third grounds because it agreed with the District Court on the first ground: at trial, Perez proved he was insane at the time of the offense.

REASONS FOR DENYING THE PETITION

The State's Petition does not raise any important federal question upon which lower courts have entered conflicting decisions or that has not been settled by this Court. At best, the State baselessly challenges longstanding, well-established law, despite having relied upon that law in the lower courts, and asks this Court to review the particular facts of this case in the context of the applicable law. The State's Petition should be denied since these are not the types of issues that are typically reviewed by way of a writ of certiorari.

I. The Issue Raised By Petitioner's First Question Was Never Raised Or Considered By The Fifth Circuit or District Court And Is Meritless In Any Event

In its Petition, the State raises *for the first time* the question of whether the District Court and Fifth Circuit had the ability to review Perez's sufficiency of the evidence claim. Not only did the State not contest the District Court's ability to review that claim, but even after the District Court granted *habeas corpus* relief with respect to the claim, the State not only failed make this argument to the Fifth Circuit, but the State tacitly conceded that the claim was cognizable by setting forth the appropriate standard of review that the Fifth Circuit should use to review the claim. Therefore, this issue is not properly before the Court, and the Court should not grant the State's Petition with respect to its first question. *See Adickes v. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, 90 S.Ct. 1598, 1603 n. 2, 26 L.Ed.2d 142 (1970) ("Where issues are neither raised before nor considered

by the Court of Appeals, this Court will not ordinarily consider them"); *Pennsylvania Dept. of Corrections. v. Yeskey*, 524 U.S. 206, 212-13, 118 S.Ct. 1952, 1956, 141 L.Ed.2d 214 (1998) (same).[6]

The State did not challenge the lower courts' ability to consider the sufficiency of the evidence claim because such challenge is without merit. The State now argues that Perez's conviction is not subject to the sufficiency of the evidence standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). (*See* State's Petition ["Pet."] at 10.) The State incorrectly asserts that because Louisiana law places the burden of proving insanity on a defendant, no "due process considerations are invoked" with respect to Perez's conviction. (*Id.*) The Louisiana Supreme Court has considered and rejected this very argument.

As the State correctly notes, a defendant in Louisiana is presumed to be sane. La. Rev. Stat. 15:432. To rebut this presumption, a defendant must prove insanity by a preponderance of the evidence. La. Code

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[6] *See also United States v. United Foods, Inc.*, 533 U.S. 405, 417, 121 S.Ct. 2334, 2341, 150 L.Ed.2d 438 (2001) (declining to consider new substantive arguments not pressed in Court of Appeals, particularly when new arguments attack a judgment); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362, 101 S.Ct. 1146, 1155, 67 L.Ed.2d 287 (1981) (finding question not raised in the Court of Appeals "is not properly before us"); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5, 100 S.Ct. 1870, 1875, n. 5, 64 L.Ed.2d 497 (1980) ("the Court ordinarily does not consider matters neither raised nor decided by the courts below"); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976) (same).

Crim. Proc. Art. 652. Almost thirty years ago, the Louisiana Supreme Court analyzed this state law insanity defense in light of *Jackson v. Virginia*, which had been decided only a couple of years earlier. *See State v. Roy*, 395 So.2d 664 (La. 1981). The Louisiana Supreme Court concluded:

> Due process now appears to require extension of the [*Jackson v. Virginia* sufficiency of the evidence] test to situations where the defendant pleads the affirmative defense of insanity . . .

Id. at 668. The Louisiana Supreme Court found added support for this conclusion in this Court's opinion in *Moore v. Duckworth*, 443 U.S. 713, 99 S.Ct. 3088, 61 L.Ed.2d 865 (1979). *Id.* In that case, this Court found that the test in *Jackson v. Virginia* should be applied to a state prisoner's *habeas corpus* petition challenging the sufficiency of the evidence with respect to his insanity defense under Indiana law. *Moore*, 443 U.S. at 714, 99 S.Ct. at 3089.

Having concluded that Louisiana's insanity defense does invoke constitutional due process concerns, thus, rejecting the State's current argument to the contrary, the Louisiana Supreme Court then adopted the very standard of review employed by both the Fifth Circuit and District Court in this case. The Louisiana Supreme Court articulated the standard as whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant did not prove by a preponderance of the evidence that he was insane at

the time of the offense. *Roy*, 395 So.2d at 669. The Louisiana Supreme Court has consistently applied this standard and interpreted the Louisiana insanity defense to implicate constitutional due process considerations ever since. *See, e.g., State v. Claibon*, 395 So.2d 770, 772 (La. 1981); *State v. Price*, 403 So.2d 660, 662 (La. 1981); *State v. Nealy*, 450 So.2d 634, 639 (La. 1984); *State v. Peters*, 643 So.2d 1222, 1226 (La. 1994); *State v. Silman*, 663 So.2d 27, 32 (La. 1995); *State v. Armstrong*, 671 So.2d 307, 309 (La. 1996).

In its Petition, the State offers no reason or authority for reversing the Louisiana Supreme Court's longstanding application of *Jackson v. Virginia* and constitutional due process to Louisiana's insanity defense. In its briefing before the Fifth Circuit, the State argued that the Fifth Circuit must consider Perez's sufficiency of the evidence claim under the very standard enunciated by the Louisiana Supreme Court, which is the standard the Fifth Circuit applied. (Original Brief of the Respondent-Appellant in the Fifth Cir. ["St.'s Fifth Cir. Brief"] at 28-29.) The State offers no justification for the reversal of its position now. Instead, the State only cites to inapposite opinions. The State cites to opinions of this Court for the uncontroversial corollary propositions that state law may place the burden of proving insanity upon the defendant and that the State does not have the affirmative duty to prove beyond a reasonable doubt the nonexistence of all possible affirmative defenses. *See Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977) (state not required to prove nonexistence of all affirmative defenses); *Medina v. California*, 505 U.S. 437, 446, 112 S.Ct. 2572, 2577, 120 L.Ed.2d 353 (1992)

(finding that allocating burden of proof to defendant to prove incompetence to stand trial did not offend due process). These propositions, however, are irrelevant to the present case. Perez has not challenged Louisiana's ability to place the burden upon him to prove insanity by a preponderance of the evidence or sought to require the State to prove sanity beyond a reasonable doubt. Instead, Perez has brought the long-recognized challenge that his due process rights were violated because no reasonable trier of fact could have found, beyond a reasonable doubt, that *he* did not prove his insanity defense by a preponderance of the evidence.[7]

II. The Fifth Circuit and District Court Applied The Correct Standard, Which Was The Very Standard The State Argued That They Must Apply

For its second question, the State assumes *arguendo* that Perez's sufficiency of the evidence claim was cognizable, but now takes issue with the standard of review used by the lower courts. This challenge to the Fifth Circuit's opinion is particularly perplexing given that the Fifth Circuit adopted the standard of review urged by the State. In its opening brief to the Fifth

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[7] The State also cites to two lower court opinions, both of which are inapposite. Both cases rely upon the Supreme Court of Michigan's interpretation of Michigan's insanity defense. *See Allen v. Redman*, 858 F.2d 1194, 1199 (6th Cir. 1988) (indicating that its opinion was based on "the analytical path taken by the Michigan Supreme Court" on a similar question certified to the Michigan Supreme Court); *Johnigan v. Elo*, 207 F.Supp.2d 599, 612 (E.D. Mich. 2002) (interpreting Michigan insanity defense and relying on *Allen v. Redmen*).

Circuit, the State set forth the following standard of review for the Fifth Circuit to follow:

> Applying the *Jackson* standard to the insanity defense under Louisiana law, the inquiry for a reviewing court is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could conclude beyond a reasonable doubt that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense. *See Donahue v. Cain*, 231 F.3d 1000, 1004 (5th Cir. 2000).

(St.'s Fifth Cir. Brief at 28-29.) Both the Fifth Circuit and the District Court adopted and applied this standard virtually verbatim.[8] (Pet. at 14a, 55a.) Therefore, the State should not now be heard to complain that the lower courts followed its guidance.

In reversing its position, the State does not articulate what it now believes the appropriate standard of review should be. Instead, the State ambiguously and incorrectly argues that the lower courts somehow treated insanity as an element of the crime as opposed to a defense upon which Perez had the burden of proof. (*See* Pet. at 15-16.) The lower courts, however, did not shift the burden of proof to the State on the issue of

[8] The Fifth Circuit even cited the *Donahue* opinion in support of the standard just like the State did in its Fifth Circuit briefing. Oddly, the State now attempts to take the Fifth Circuit to task for citing the very same opinion that the State cited in support of the very same standard that it urged the court to apply. (*See* Pet. at 17-18.)

insanity. Instead, the standard they employed specifically analyzed whether *Perez* failed to prove by preponderance of the evidence that he was insane, not whether the State failed to prove sanity. (*See* Pet. at 14a, 55a.)

Aside from being the standard of review they were urged to use by the State, the standard used by both the Fifth Circuit and the District Court is the standard that the Louisiana Supreme Court adopted to review the Louisiana insanity defense under the constitutional due process requirements of *Jackson v. Virginia*. As the Louisiana Supreme Court has long held:

> In reviewing a claim of insufficiency of evidence in regard to a defense of insanity, this court applies the test set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the defendant had not proved by a preponderance of the evidence that he was insane at the time of the offense. [Citations omitted.]

Peters, 643 So.2d at 1225.[9] The State has not and cannot offer any legitimate reason to call into question this longstanding standard.

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[9] *See also Claibon*, 395 So.2d at 772; *Price*, 403 So.2d at 662; *Nealy*, 450 So.2d at 639; *Silman*, 663 So.2d at 32; *Armstrong*, 671 So.2d 309.

III. The Fifth Circuit and District Court Correctly Applied The Standard Of Review To The Facts Of The Case

Finally, as its third question, the State asks this Court to review whether the Fifth Circuit correctly applied the standard of review with respect to Perez's sufficiency of the evidence claim to the particular facts of this case. The State incorrectly points to several supposed "errors of fact" made by the Fifth Circuit and argues that the Fifth Circuit misapplied the standard of review. This is not the type of question for which the Court should grant a writ of certiorari. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Any review of this third question by the Court will be limited to this case alone and will not have any impact on other similar cases since such review will be based upon and limited to the particular facts of this case. Furthermore, this question does not implicate any important question of federal law that this Court has not settled or any conflicts between lower courts with respect to an important federal question. For these reasons alone, the Court should deny the State's Petition with respect to the third question presented.

Aside from the fact that the State's third issue is not the type that should be reviewed by way of a writ of certiorari, the State's contention on this issue is without merit. The Fifth Circuit correctly applied the appropriate standard of review to the facts of the case in affirming the District Court's *habeas corpus* judgment. The State's Petition merely repeats the same

arguments that both the Fifth Circuit and the District Court appropriately rejected in their lengthy, well-reasoned opinions.

As the Fifth Circuit and District Court concluded, no rational trier of fact could conclude beyond a reasonable doubt that Perez failed to prove by a preponderance of the evidence that he was insane at the time of the offense. *See Peters*, 643 So.2d at 1225 (setting forth appropriate standard of review). "A preponderance of the evidence means evidence of greater weight or evidence which is more convincing than that offered in opposition to it." *ODECO Oil & Gas Co. v. Nunez*, 532 So.2d 453, 457 (La. App. 1988). It means that "the evidence, taken as a whole, shows the fact or cause sought to be proven is more probable than not." *Crowell v. City of Alexandria*, 558 So.2d 216 (La. 1990); *State v. Green*, 960 So.2d 1270, 1272 (La. App. 2007). Viewing the evidence in the light most favorable to the State, a rational trier of fact could not conclude that the evidence of insanity, which consisted of the testimony of all seven expert witnesses, did not outweigh or was not more convincing than the evidence of sanity, which was nonexistent.

Tellingly, the State does not actually argue that its supposed evidence of sanity *preponderated* over Perez's overwhelming evidence of insanity. Instead, the State only argues that the jury could have "reasonably rejected" the evidence of the defense. The State uses the phrase "reasonably rejected" to avoid using the phrase "beyond a reasonable doubt." Yet "beyond a reasonable doubt" is the burden the State is trying to impose on Perez, even if it does not candidly admit trying

to do so. Like it did before the Fifth Circuit and the District Court, the State attempts to argue that the jury may have had reason to "reject" (*i.e.*, doubt) certain bits and pieces of the defense's evidence of insanity or that if the jury looked at other evidence through just the right prism it might be interpreted in the State's favor, but what the State has never done, and cannot do, is demonstrate or even argue that the evidence of sanity outweighed that of insanity. It does not matter if the jury could have reasonably rejected or doubted certain evidence. The issue is whether the jury, acting as a rational trier of fact, could have concluded beyond a reasonable doubt that the evidence, *taken as a whole*, did not make it more probable than not that Perez was insane. As the Fifth Circuit and District Court found, a rational trier of fact could not have so concluded.

A. The Defense Presented Overwhelming Evidence of Insanity

Perez's wife and son testified regarding Perez's delusional behavior leading up to the offense, and six mental health experts testified that Perez was legally insane at the time of the offense.[10] All but one of these experts had either been appointed by the trial court as part of Perez's sanity commission and/or were employees of the State. The experts testified that they looked and tested for signs of malingering (*i.e.*, that Perez was faking his mental illness), and that they were able to

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[10] A seventh mental health expert also testified that Perez was insane, but he was not asked to, nor did he opine on whether Perez was capable of distinguishing right and wrong at the time of the offense.

rule out that possibility. Two of the experts also testified regarding Perez's improvement with medication and treatment, which is an accepted indicator of insanity. *See Peters*, 643 So.2d at 1226; *Roy*, 395 So.2d at 668.

B. The State Presented No Credible Evidence of Sanity

In contrast to the defense's overwhelming evidence of insanity, the State presented no direct evidence of sanity and no direct evidence that could credibly rebut the defense's evidence. The State did not call a single expert witness to challenge the defense's experts or to offer an opinion that Perez was sane at the time of the offense. Although it is well-established that the State is not required to call expert witnesses to rebut the conclusions of a defendant's expert,[11] "the opinions of experts may not be arbitrarily ignored." *Brock v. United States*, 387 F.2d 254, 257 (5th Cir. 1967). Thus, the State is left only with the assertion that the jury did not "arbitrarily ignore" all of the experts at trial.

However, the testimony of disinterested experts appointed by or employed by the State — as almost all were in this case — carries substantial weight against lay witness testimony and any attempts to undermine the expert testimony merely through cross-examination. *See Bishop v. United States*, 394 F.2d 500, 501 (5th Cir. 1968). Furthermore, the State cannot simply rely on facts that are neutral as to the issue of insanity or testimony that arguably could "cut both ways" to rebut the

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[11] *See Mims v. United States*, 375 F.2d 135, 140-43 (5th Cir. 1967); *Breland v. United States*, 372 F.2d 629, 633 (5th Cir. 1967).

defense's expert testimony. *See Peters*, 643 So.2d at 1226 (facts that are neutral on the issue of insanity are legally insufficient to support a sanity finding in the face of contrary expert opinion); *Douglas v. United States*, 239 F.2d 52, 59 (D.C. Cir. 1956). Yet, the only "facts" that the State points to in its Petition are either misconstrued by the State or are, at best, neutral as to whether Perez was insane at the time of the offense.

As the State has done throughout the *habeas* review process, it attempts to make much of a Charity Hospital notation that Perez was "alert times three." Dr. Carrington testified at trial that "alert times three" essentially means that Perez was not unconscious at the time and nothing more probative as to his mental state. Dr. Urrutia also testified that he considered the Charity Hospital record in conjunction with his examination of Perez, and he still concluded that Perez was insane at the time of the offense. In other words, the experts at trial testified that the Charity Hospital record was not probative as to the issue of insanity and certainly was not evidence of sanity as the State contends. (*See* Pet. at 18a-19a.)

The State also points to the facts that Perez pulled a gun on a security officer earlier in the day of the offense and hid after shooting Officer McCormick as objective evidence of Perez's mental state. These facts, however, are neutral at best, and, thus, are not sufficient to rebut the expert testimony. *See Peters*, 643 So.2d at 1226. The facts that Perez was scared that a security officer was going to take his son away — despite no reason for the officer to do so — and that he hid after the shooting are entirely consistent with Perez being in a delusional,

paranoid state. He was hiding from imagined pursuers in Ms. Mastio's shed; it is entirely consistent with his delusional state that he would then hide under the house next door after shooting into the dark at a stranger rapidly descending down the stairs towards him.

The Louisiana Supreme Court considered an almost identical argument based on much stronger evidence in favor of the State and rejected that argument in the *Peters* case. In *Peters*, two expert witnesses testified that the accused was insane at the time of the offense. *Peters*, 643 So.2d at 1225. The State did not present any expert testimony to rebut the defense's experts. *See id.* at 1226. Nonetheless, the jury convicted the defendant of murder. *See id.* On appeal, the State made the same argument that it makes in this case; it argued that it had presented lay evidence that rebutted the experts' testimony. The State argued that the fact that the accused only killed his estranged wife, had a revenge motive based on an altercation a year earlier that had blinded his right eye, had issued a warning to the victim's child's grandmother the week before the murder, and had lit a cigarette, smiled, and calmly rode away from the murder on his bicycle proved that the experts were wrong. *See id.* at 1226. The court of appeal disagreed and reversed the conviction. The Louisiana Supreme Court affirmed the reversal on the grounds that there was insufficient evidence to find the defendant sane at the time of the offense. *See id.* The appellate courts found that the facts cited by the State were neutral, at best, on the issue of insanity. *See id.*

The facts relied on by the State in the *Peters* case told a far more compelling story of sanity that the facts

relied upon in this case. In *Peters*, the facts suggested motive, forethought, and calm, cold-blooded execution. Here, all the State offers is a nebulous and factually unsupported argument that maybe some of Perez's action could be considered "rational."

To support its factually devoid argument, the State now suggests that maybe Perez actually was involved with drugs and being pursued by drug dealers. However, as the Fifth Circuit and District Court found, there was absolutely no evidence at trial that Perez was in fact involved in drugs and/or being followed by drug dealers:

> [Perez's son] testified that he told police they were being followed by gangs from Texas because his father told him that. He did admit telling the police his father thought his step-grandfather's friends sold drugs, but he also told police that his father was not involved with narcotics. Detective Catalanatto confirmed this statement. The record simply provides no basis for a rational jury to conclude that Perez was being chased by drug dealers, and Perez's behavior may not be so neatly explained away.

(Pet. at 24a.) In other words, the only testimony regarding drugs was based on the beliefs of Perez, who all of the experts agreed was insane. The State offered no actual evidence, independent of the delusional beliefs

of Perez, that drug dealers were pursuing Perez and his son.[12]

C. The State Did Not Undermine The Defense's Overwhelming Evidence

Not only did the State not present any affirmative evidence to rebut the defense's overwhelming evidence of insanity, but the State also did not undermine the testimony of the defense's independent, disinterested experts in any meaningful way. The State's claims of impeachment of the experts range from the factually incorrect — that Perez's family provided inconsistent statements to the police and experts — to the inconsequential — such as whether Perez's condition may have deteriorated while incarcerated.

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[12] In its Petition, the State for the first time attempts to make much of a police report written by Lieutenant Taylor. Not only does the State mischaracterize what the report actually says, but there was significant doubt cast on the veracity of the report at trial. Far from reporting that Perez's son said that his father had delivered drugs for gang members, the report contains a much more ambiguous statement that the van Perez and his son were in did not contain any drugs because "it was taken out in Texas." Like all of the other testimony regarding drugs or drug dealers, the statement was only based on what Perez supposedly told his son. Furthermore, testimony was presented at trial that this statement was not contained in the original report detailing Lieutenant Taylor's conversation with Perez's son, which occurred prior to the shooting. Instead, the statement, which is inconsistent with both the testimony of Perez's son and Detective Catalanatto, was only added to the report after Lieutenant Taylor learned that Perez had shot Officer McCormick.

The State claims that the experts relied upon the statements of Perez's wife and son but that those statements were untrustworthy because they changed over time. As a preliminary matter, the veracity of the family's statements is largely immaterial to the weight to be given to the experts' opinions. As the Fifth Circuit correctly observed, the experts did not solely rely upon these statements to reach their conclusions. Instead, they "also considered information from personal examinations of Perez, test results, arrest reports, and witness testimony." (Pet. at 21a.) As Dr. Kronberger testified, his opinion was based on multiple examinations, spanning approximately 14 hours. The information provided by Perez's family "just added a little bit of flavor." (*Id.*)

Furthermore, the State is wrong that the stories of Perez's wife and son changed over time. The State tries to make much of the fact that an unsophisticated layperson, Rosa Perez, had not diagnosed her husband with a delusional mental illness based on his odd behavior prior to the shooting. The State essentially argues that because of this, the experts could rely on nothing else that they learned from Mrs. Perez and could not come to their own conclusions regarding Perez's mental health based on the facts she, her son, and Perez relayed. The State contends that Mrs. Perez changed her story over time, concocting Perez's delusional symptoms for the experts. The State is wrong.

Although Mrs. Perez did tell Detective Catalanatto the day after the shooting that she was not aware of any specific psychological problems that her husband

had, she also told the detective about the paranoid, delusional behavior she later described to the experts. Specifically, Mrs. Perez described the following behavior:

> (1) Perez called her and told her that he and his son were being followed by people trying to kill them;
>
> (2) During that call, Perez indicated that he believed someone was holding her hostage;
>
> (3) In the days leading up to the shooting, Perez had been acting strange and saying that people were trying to get him and his family out of their home.

Corroborating Mrs. Perez's account, Perez's son, Salvador, Jr., described the following to the detective that very same day:

> (1) Perez fled Texas with his son to get away from "gangs" and to protect Mrs. Perez and the Perez's other children;
>
> (2) Perez believed that people in random cars were chasing him and attempting to take away his son: at one point a brown Chevrolet, then a dark reddish car, then a black Saturn, and then a small white car;
>
> (3) Perez believed that the gangsters that were after them were resting in blue barns at the New Orleans horse track;

(4) Perez was scared that a security guard at the Fairgrounds was trying to take his son away from him; and

(5) In general, Perez acted scared during the trip from Texas to New Orleans.

Perez's family relayed the same facts the day after the shooting as they later did to the experts and then at trial. The fact that Mrs. Perez had not herself diagnosed Perez as having a specific mental illness based on his odd, delusional behavior does not undermine the opinions of the seven experts who, also based on their own evaluations of Perez in person, were able to determine that he was suffering from a mental disease.

The State also attempts to argue that the fact that two of the experts originally found Perez to be competent to stand trial undermines all of the experts' opinions. Those experts, Dr. Deland and Dr. Salcedo, changed their opinions after further examination of Perez. They initially found Perez competent because he provided minimal, vague answers to their questions, which might be a sign of malingering. However, as Dr. Deland testified, it is not unusual for a paranoid individual initially to present as competent. After further observation, improvement with anti-psychotic medication, and Perez becoming more communicative, both doctors appropriately revised their initial opinions, determined he was not malingering, and found him to be insane. (Pet. at 20a.) In other words, the doctors supported the change in their initial opinions with the additional facts and observations made after that initial opinion, and they explained why they were mistaken in

their initial opinions. Far from undermining their opinions at trial, the fact that these two doctors took a hard, critical look at whether Perez might be malingering only strengthened the credibility of their ultimate determination that he was not.

Finally, the State argues that the jury could reject the experts' testimony because their opinions were based on observations made well after the shooting. In support of this argument, the State points to the testimony of Dr. Carrington. The State asked Dr. Carrington if Perez's living conditions at the Feliciana Forensic Facility could have contributed to his condition when Dr. Carrington first examined him. Dr. Carrington acknowledged that it was "possible." However, the State was careful not to ask the obvious follow-up questions. The State did not then ask Dr. Carrington if he thought Mr. Perez's time at Feliciana was the only cause of his delusional state or whether Dr. Carrington thought Perez may have been sane prior to his time at Feliciana. (*See* Pet. at 19a.) In other words, Dr. Carrington's response to the State's hypothetical question proved nothing regarding Perez's mental state at the time of the offense. If anything, it only called into question Perez's care and living conditions at the Feliciana Forensic Facility.

In summary, all of the disinterested, impartial experts testified that Perez was insane at the time of the offense; no experts testified to the contrary. The two lay witnesses that observed Perez in the days leading up to the offense testified regarding his strange behavior. On the other side of the ledger, the State offered no affirmative evidence to support a finding of

sanity or to dispute the defense's evidence of insanity, and did not undermine the defense's evidence in any meaningful way. Without question, the evidence of greater weight was on the defense's side. The defense's evidence was more convincing than that offered in opposition to it. No rational trier of fact could have concluded, beyond a reasonable doubt, that the evidence, taken as whole, did not show that it was more probable than not that Perez was insane at the time of the offense.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

G. BENJAMIN COHEN
Counsel of Record
636 Baronne St.
New Orleans, LA 70113
(504) 529-5955

JOHN R. DANOS
ARNOLD & PORTER LLP
777 S. Figueroa St., 44th Fl.
Los Angeles, CA 90017
(213) 243-4000

Counsel for Respondent